



Federal Trade Commission/Office of the Secretary, Room H-135 (Annex W)
Re: Business Opportunity Rule, R511993
600 Pennsylvania Avenue, NW
Washington, DC 20580
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Dear Sir or Madam:

I am writing in response to The Federal Trade Commission's ("FTC") request for comments to the New Business Opportunity Rule R511993 ("Rule"). I applaud and appreciate the FTC's role in protecting the public from "unfair and deceptive acts or practices." However, provisions of the Rule need further consideration, refinement or elimination because they will make it very difficult and costly, if not impossible, for legitimate companies like The Kirby Company to continue manufacturing and selling its products in America.

Kirby. By way of introduction, I am the Vice President of Consumer and Public Relations, Aftermarket Parts, Integrated Marketing and Distribution for The Kirby Company ("Kirby"). For over 92 years, Kirby has manufactured premium home cleaning systems in the United States. Kirby sells these American made systems to independent distributors around the world, who in turn market them directly to consumer-end users. Kirby products are currently sold in 68 countries.

Kirby's longevity is the result of producing a well made product and providing an exceptional opportunity for its sales force. Kirby's independent distributors purchase products from Kirby. These distributors then build their own sales organizations which sell the products to consumer-end users. The profit a Kirby distributor makes is the difference between the price at which he or she sells the unit and his or her expenses.

Some sales people work full time, but many work part time to supplement their income when needed. Other sales people work during breaks from school or around holiday seasons. Kirby distributors currently have approximately 10,000 such individuals in the US. In addition to the ability to schedule their own work hours, one of the most attractive aspects of the position is the ability for an individual to become a Kirby distributor and build his or her own sales force. As drafted, the Rule could require most, if not all, of these individuals to comply. If this Rule is adopted as written, it would very likely destroy the earning opportunities Kirby and other direct sellers have created.

Legitimate purveyors of business opportunities. The drafters appear to have written the Rule without fully appreciating or understanding the direct sales industry. The Rule estimates that there are currently 3,200 business opportunity sellers which must comply with the Rule. Kirby alone has three (3) times that amount. If one considers only the 200 or so Direct Sales

Association (“DSA”) members, more than one million (1,000,000) direct sellers would need to comply with the Rule as “business opportunity sellers.”

The direct sales industry is much larger than the Rule estimates. Unfortunately, the Rule makers rely on the statements of comparatively few commentators to wrongly conclude that “many business opportunities are permeated with fraud” to justify the decision to regulate business opportunities. A careful look at the material on which the Rule is based reveals a different story. The very commentators on which the FTC relies to justify the Rule acknowledge the Rule’s inability to reach fraudulent operators. For example, the Rule cites Christopher who describes business opportunity sellers as: “Individuals who go from one business opportunity to the next, violating laws, committing frauds....” Christopher is wrong and the FTC’s reliance on it is misplaced for several reasons.

First, as noted above, even considering only those companies in the DSA, the Rule significantly underestimates the number of legitimate business opportunity sellers. The commentators increase the percentage of fraudulent operators by simply ignoring or not counting the overwhelming majority of the legitimate ones that exist.

Second, the Rule acknowledges that laws already exist which criminalize the behavior of the scam artists. Yet, the Rule also acknowledges that these criminals act despite the existence of those laws. In other words, the illegitimate operators do not fear prosecution. The Rule assumes that if adopted, the illegal operators will comply with this Rule. No evidence exists to prove they will operate any differently. What we are left with is a Rule which burdens, and as a result, harms legitimate sellers.

Third, the FTC interestingly cites its own review of business opportunity complaints, which concludes that most complaints were a single complaint filed against a single company and that “[o]nly a few companies appeared to exhibit any pattern of problematic behavior.”¹ The Report further states that “[v]ery few companies generated more than one complaint.”²

The Rule takes aim at these “few companies” by unnecessarily placing an enormous burden on all legitimate direct sellers. As drafted, hundreds of thousands of direct sellers alone will need to comply with the Rule, not just the 3,200 the Rule estimates. The costs and impact of compliance are significant and discussed in further detail below. Because many direct sellers do very little business, the cost of compliance will effectively drive them from the business altogether.

Kirby could not have stayed in business for 92 years without operating legally and ethically. The Rule however lumps together legitimate companies like Kirby and those in the DSA with the illegitimate ones; the ones mentioned by Christopher, jumping from opportunity to opportunity. The

¹ Bureau of Consumer Protection Staff, *Franchise and Business Opportunity Program Review 1993-2000: A Review of Complaint Data, Law Enforcement and Consumer Education* (June 2001) (“Staff Program Review”) (available at <http://www.ftc.gov/reports/franchise93-01.pdf>), Page 7.

² *Id.* Page 14.



Rule, through its required disclosures, creates the impression that any company offering a business opportunity is not legitimate. The FTC must amend or eliminate those portions of the Rule that require all direct sellers to comply. Otherwise, the FTC risks effectively eliminating those income earning positions in the US altogether, not to mention the jobs associated with producing those products, such as Kirby's US manufacturing positions in Ohio and Texas.

Seven (7) day waiting period. As applied to direct sales companies, the seven day waiting period to enroll is burdensome and excessive. The cost to enter direct sales is very low, a point lost on the commentators cited in the Rule. In fact, consumers routinely make many purchases that cost much more than the cost of entering direct sales and they do not have to wait seven days. The mandatory waiting period creates the impression that there is something wrong with all direct sales opportunities. This seven-day waiting period is unnecessary, because most direct sales companies, including Kirby, already have a buyback policy for all products, including sales kits purchased by a salesperson within the last twelve months.

Further, some direct sellers, including those entering Kirby, enter the business because they need to start earning income right away. Direct sellers often work during breaks in school, during holiday seasons, to earn supplemental income to cover an unexpected expense or to earn money for a planned expenditure like a trip. In these cases, they need to begin earning money right away. The fact that people enter the business for these reasons at these times reinforces the fact that the cost of entry is quite low. The seven day waiting period will cause many people to steer clear of or avoid direct sales positions and take positions elsewhere. The Rule's recordkeeping and retention requirements are burdensome and include enormous administrative and opportunity costs.

Disclosure of legal actions. The Rule requires the release of **any** information regarding prior litigation and civil or criminal legal "actions" involving misrepresentation, fraud, securities law violations or unfair or deceptive practices. The Rule also requires disclosure of such information for all affiliated companies, parents and subsidiaries, even if these other companies do not have any business related to the affiliate offering the business opportunity. The Rule also requires disclosure of legal actions involving its officers, directors and sales managers. Finally, the Rule requires disclosure whether or not the company or individual was found innocent.

Since the 1800's, a cornerstone of American jurisprudence is "innocent until proven guilty." In one stroke of the pen, the Rule changes this century old dictum to "guilty even if proven innocent" by requiring disclosure of actions even if the company or individual received a favorable ruling.

First, a company places itself at an enormous risk by disclosing criminal actions of employees or directors unless those acts resulted in a criminal conviction. Requiring disclosure of any "action" not resulting in a conviction is prejudicial to the individual and could give rise to a cause of action by the individual against the company, which, ironically, it may have to report under the Rule.

Second, my thirteen years of experience in Customer Relations has shown that manufacturers face a constant stream of baseless actions or suits from customers. For example, a common example is when a customer misuses or abuses a product. Often they seek free repair work under the warranty. Kirby's warranty, like most product warranties, does not cover damage arising from abuse or misuse.

The customer, desperate for someone to assume responsibility for his or her mistakes, attempts to transfer liability, claims that they were misinformed of the terms of the warranty at the time of the sale, which, they claim amounts to fraud. Although such claims are without merit, the Rule requires disclosure. We at Kirby see no value in disclosing actions or lawsuits unless Kirby is found guilty or liable for the specific types of actions enumerated by the Rule. Otherwise, Kirby is put at an unfair advantage of defending itself again in these cases to the prospective purchaser even though an impartial judge has already found Kirby innocent of wrongdoing. In addition, nearly every complaint automatically includes a claim for misrepresentation, whether or not it has merit. The FTC should revise the Rule to limit disclosure to litigation that is related to the earning opportunity offered to the prospective distributor.

Finally, The Kirby Company is a very small part of publicly traded Berkshire Hathaway, Inc. Kirby alone has over 20 sister companies whose businesses, products and distribution channels have nothing to do with Kirby. Some of the other affiliated companies are insurance companies, such as Geico. Nearly every action for the recovery of an insurance claim includes allegations of fraud and/or misrepresentation. Kirby would need to add at least one full time person to do nothing but monitor all of the lawsuits filed against all of the companies under the Berkshire umbrella, even though they have nothing to do at all with Kirby's business. Some of these affiliates who are not subject to the Rule, would, nonetheless, have to add personnel to assist Kirby in complying with the Rule. The Rule needs to limit the disclosure of lawsuits to only those involving the company offering the business opportunity and only those in which the company was found guilty or liable.

The Rule requires business opportunity sellers to disclose a minimum of 10 prior purchasers of the business opportunity nearest to the prospective purchaser. Kirby gladly provides references. In fact, many new sales people learn of the opportunity through family or friends. However, Kirby objects to the required publication of names and contact information on the grounds of privacy, to protect a valuable business asset and because disclosure adds an administrative burden and cost.

Identity theft is quite prevalent today. Kirby is very uncomfortable providing the personal information of individuals (without their approval) to strangers. Ironically, the requirement to provide references may result in privacy lawsuits, which Kirby would have to report under the Rule. Further, current distributors entered into the business opportunity without notice that Kirby may have to disclose their information.

The fact that the rule makers quickly dismissed the potential for competitors to misuse the list of purchasers demonstrates their lack of appreciation of the direct sales business. Direct sales have a low barrier to entry. Disclosure of purchasers will have the exact opposite effect as that intended by rule makers by making the recruitment of prospective clients much easier for unscrupulous operators. Instead of scouring the public for leads, unscrupulous operators will now have access to a list of business opportunity purchasers whom they can call to entice them to leave their current situation. The absence of controls governing the use of the list will very likely and unfairly benefit our competitors.

In order to generate the list of the 10 prior purchasers, Kirby will need to obtain the address of the prospective purchaser, search our database for the geographically nearest existing offices, create a software program or online service such as Mapquest to confirm these are the correct sales



people, and then send these results to our distributor. This adds another administrative cost to compliance.

The following sentence required by the Rule will prevent many people from wanting to enter direct sales: “If you buy a business opportunity from the seller, your contact information can be disclosed in the future to other buyers.” Now more than ever, people are very concerned about their privacy and identity theft and so are we from a privacy litigation standpoint. Individuals will be reluctant to share their personal information with individuals they may have never met. In addition, most business opportunity owners will exercise caution in discussing the opportunity for fear that they could find themselves in legal trouble over what they may say or not say to the prospective purchaser. It is only a matter of time before a purchaser, who after doing his or her due diligence, fails at the business opportunity. Even if the failure was due entirely to fault of the purchaser, any lawsuit he or she files would probably include a claim of fraud or misrepresentation against the references with whom he or she spoke.

The Rule requires direct sellers to gather information on sales people such as time periods, demographic/geographic data and earnings claims. Kirby does not believe that this approach is effective in preventing the targeted business opportunity fraud, since those perpetuating fraudulent business opportunities will not provide accurate data. However, direct sellers such as Kirby, which try to faithfully comply, will have the difficult if not impossible challenge of interpreting and meeting some of the proposed requirements.

Kirby certainly appreciates the outstanding work the FTC does to protect consumers. However, Kirby also believes that the Rule has many unintended consequences, which may destroy our business and the businesses of tens of thousands of direct sellers throughout the United States. Kirby also believes that there are less burdensome alternatives available in achieving the consumer protection goals stated in the proposed rule.

Thank you for your considering our comments.

Sincerely,
Robert G. Shumay
Vice President
Consumer and Public Relations, AMPD and Distribution

Via email to: <https://secure.commentworks.com/ftc-bizopNPR/>

